UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107
Respondent

and **Case 28–CA–209109**

JAVIER CABRERA, an Individual
Charging Party

Fernando Anzaldua, Esq., for the General Counsel.
Sean W. McDonald. Esq., and Michael Urban, Esq., (The Urban Law Firm),
for the Respondent.
Michael J. Mcavoyamaya, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on February 26-March 1, 2019, in Las Vegas, Nevada. Javier Cabrera filed a charge on November 1, 2017, alleging violations by Service Employees International Union Local 1107 (Respondent) of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs.
I carefully observed the demeanor of witnesses as they testified, and I rely on those observations here. I have studied the whole record, including the post hearing briefs and based upon the detailed findings and analysis below, I conclude that Respondent violated the Act essentially as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find

1(a) At all material times, Respondent, a labor organization, has been an unincorporated association with a place of business in Las Vegas (respondent's facility), where it represents employees in bargaining with employers.

(b) At all material times Respondent has been chartered by Service Employees International Union which maintains its national headquarters in Washington, D.C.

(c) In conducting its operations during the 12-month period ending November 1, 2017, Respondent collected and received dues and initiation fees in excess of $500,000 and remitted from Respondent's facility to the Washington D.C. facility of Service Employees International Union dues and initiation fees in excess of $50,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times Nevada Service Employees Union Staff Union (the Staff Union) has been a labor organization within the meaning of Section 2(5) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Luisa Blue-	Trustee
Davere Godfrey-	International Representative
Martin Manteca-	Deputy Trustee
Peter Nguyen-	Director of Representation and Organizing
Grace Vegara-	Organizing Director
Barry Roberts-	International Representative
Helen Sanders-	International Organizer

II. Alleged Unfair Labor Practices

A. Background

Respondent is a labor union with a staff consisting of approximately 20 employees. The field staff included approximately 10 employees whose job duties included but were not limited to talking to members daily, representing employees, identifying and training stewards, visiting worksites, conducting membership meetings, participating in bargaining sessions, recruiting and signing up new members. On April 28, 2017, Local 1107, was placed into an emergency trusteeship. The trusteeship was implemented after the Local President and Vice President were alleged to have engaged in misconduct. (Resp. Exh. 1). As a direct result of the trusteeship, all of Local 1107s officers, Executive Board members, trustees and representatives were removed from office and the local Constitution and Bylaws were suspended. All of the management functions of the local were assumed by the Trustee, Luisa Blue and the Deputy Trustee, Martin Manteca who was placed in charge of the day to day operations. At the time of the trusteeship, Javier Cabrera was employed as an organizer with Local 1107. He was also member and

President of the Nevada Service Employees Staff Union (Staff Union), a union whose bargaining unit consisted only of the staff of Local 1107.

B. Cabrera's Employment During the Trusteeship

1. Cabrera's Union Activity

Respondent and the Staff Union were signatories to a collective-bargaining agreement (CBA) which was in effect from January 1, 2015 to December 31, 2018. (GC Exh. 5). Cabrera served as President of the staff Union from 2008 until his termination. Cabrera participated in negotiations as well as the grievance process. (Tr. 531). Article 7 of the CBA addressed Disciplinary Action and provided in part:

> A. Just Cause
>
> No employee who has satisfactorily completed his/her probationary period may be disciplined, suspended or terminated without meeting the 7 steps of just cause.
>
> B. Progressive Discipline
>
> Unless circumstances warrant severe actions, the Employer will use a system of progressive discipline. Progressive steps shall include:
>
> • Coaching/Action Plan (non-punitive)
> • Verbal Warning
> • Written Warning
> • Final Written Warning
> • Disciplinary Suspensions without Pay
> • Termination of Employment (GC Exh. 5).

It is undisputed that from the commencement of the trusteeship until his termination, Cabrera filed grievances that both the Trustee Blue and Deputy Trustee Manteca were aware of. These included grievances that were filed in September and October of 2017, that directly accused Martin Manteca of being "aggressive and intimidating" and "displaying a lack of dignity and respect," in another he was characterized as "intimidating, threatening" and used practices to "instill fear in staff." (GC Exh. 12).

2. The August 2, 2017 Investigatory Meeting

On April 12, 2017, prior to the trusteeship, Cabrera attended a meeting with the Las Vegas Convention and Visitors Authority (LVCVA). During a caucus, Cabrera left his phone on the table in the room with the recording function activated while he and the person he was representing left the room. The employer discovered the phone was in a recording mode and questioned him about it. He acknowledged that his phone was recording and immediately in the presence of the employer's representatives deleted the recording. After the meeting concluded, he immediately notified his manager Peter Nguyen about the incident. He was advised of the

seriousness of the incident but was notified that given that he was proactive about reporting it, he would receive a verbal warning and was instructed not to do it again. (GC Exh. 10).

After the Trusteeship took effect, the issue resurfaced when on May 25, 2017, and July 14, 2017, Barbara Bolender, the Chief Human Resources Officer for LVCVA sent Manteca letters regarding the incident. (R. Exh. 62). On August 2, 2017, an investigatory meeting was held with Cabrera over the prior incident for which he had already received a verbal warning. In this meeting, Cabrera was questioned about the incident. He advised that the recording was inadvertent and that it was his ordinary practice to record bargaining sessions per agreement of the parties and that this was done out of routine and habit but that upon discovery he immediately deleted the recording.

After the investigatory meeting, on August 11, 2017, Cabrera was issued a letter by Davere Godfrey. The letter served to confirm as appropriate the prior verbal warning of Mr. Nguyen. The letter directly stated, "the union finds that the discipline imposed by Mr. Nguyen stands and shall be filed accordingly." (GC Exh. 3).

3. The Terrible Toothache

On October 15, Cabrera texted Davere Godfrey to advise him that he had a bad toothache, he wouldn't be in to work and that he needed someone to cover for him the next day October 16, 2016. Davere Godfrey did not respond, so on October 16, 2016, Cabrera emailed Grace Vegara asking if she could arrange for coverage for a tabling event that was scheduled for that day. (GC Exh. 9). Despite not being at work, Cabrera made logistical arrangements for the visit. (GC Exh. 16). Cabrera also later advised that he was going to a dentist appointment at 9 a.m. the following day and that it was scheduled to last approximately 1.5 hours but he wasn't sure he could make it back in time for a shop visit. Besides the shop visit event, Cabrera also had scheduled a Public Defender site visit and scheduled phone banking. (GC Ex. 15). Vegara advised that she had found coverage for the shop visit and that another employee would join Cabrera at the Public Defender site visit. Her email sent at 11:13 p.m. ended with, "I hope everything goes well with your dental visit. See you tomorrow." (GC Exh. 9). Cabrera failed to attend the Public Defender event scheduled for 1:30 to 2:30 p.m. nor the phone banking scheduled from 3−5 p.m. (GC Exh. 15). Although he did not attend the events, the events took place as scheduled. For the Public Defender event, Godfrey on the morning of the 17th arranged for Randy Peters to serve as a back-up in case Cabrera did not show up. (Tr. 256). Even though he was "out sick" (as Cabrera described in his diary), he was in direct communication with his lead supervisor and in fact communicated with her regarding the Public Defender meeting to ensure that the meeting was covered. (GC Exh. 14, 23).

During the time frame above Respondent had in place the following written attendance policy which provided in pertinent part:

> Employee's accrue eight (8) hours of leave for each bi-weekly pay period which may be used for sick leave, vacation, or personal leave.
>
> Employees are expected to be on the job whenever needed to fulfill their assignments and job duties. Employees should expect to work long and irregular

> hours. Of course, there is an expectation that all employees be on time for all appointments and meetings and to meet deadlines and keep their assignments schedule. Employees are to follow instructions from their supervisors, and to be available to work nights, weekends, and travel out of town on short notice. (GC Exh. 24).

In practice, Respondent maintained a liberal attendance policy in which employees routinely at least one a month had "no call no shows" and were not disciplined. (Tr. 114−115).

Cabrera returned to work on October 18, 2017. Cabrera was prescribed on October 17, 2017, Acetaminophen-Codine #3 (a combination of a narcotic pain reliever and analgesic) and on October 23, 2017, he had a root canal performed and was prescribed Ibuprofen 800 Mg tablets (an NSAID) for the pain associated with his dental procedure. (GC Exh. 23).

4. Together We Rise Initiative

During Cabrera's tenure, the International Executive Board Launched "Together We Rise" (TWR) an initiative aimed at improving the quality and consistency of member data. One of the goals of the initiative was to "revolutionize" the strategy for communications with members "to embrace frequent, interactive digital engagement" of members. (GC Exh. 6). As part of the initiative, organizers were instructed to gather TWR signature cards. The cards contained spaces for ordinary identifying information including, name addresses, phone numbers but also more significantly contained language in which the person by providing their phone number consented to the use of "automated calling technologies and/or text messages." (GC Exh.20). Respondent nevertheless routinely electronically communicated directly with members who did not have TRW cards signed. (Tr. 124). The organizers were provided training on the TWR cards and they were verbally advised that the cards would not be effective unless signed by the member. In gathering TWR cards there was no deadline for members to sign cards and organizers were authorized to return cards to members to have them signed because the union was always "building their list." (Tr. 122–124). If organizers returned with cards that had missing information they would typically receive "coaching" in which the importance of filling out the cards was explained. (Tr. 313).

On October 18, 2017, Cabrera was assigned to conduct various events including an employee orientation for Clark County, and a social services event. While at the social services event, Cabrera realized that he had forgotten to bring the TRW cards with him. Rather than cancel the meeting, Cabrera decided to improvise and created a sign in sheet to gather critical information from the attendees. (GC Exh. 17). He asked the attendees to sign the sign in sheet and advised that he would come back to do their picture IDs they would sign the actual TWR cards. (Tr. 395). He wrote, dated and initialed a personal note on the sign in sheet which stated, "submit their personal info on card then get them to do survey at picture day cause (sic) I did not bring cards today they are in another box." (GC Ex. 17). Sometime thereafter, Cabrera transferred the identifying information from the sign in sheets to TRW cards but did not sign them. (GC Exh. 20 Tr. 399). During the month of October, Cabrera also submitted 27 TWR cards with the words "on file."

5. The Debrief Sheets

Debrief sheets were in essence prepared forms that chronicled an organizer's work for the day. It was a way for organizers to report the work that was done and the persons contacted. The debrief sheet included information regarding contacts, emails, text cell phone authorizations, names of contacts and notes. (GC Exh. 18, 19). The debrief sheets were filled out by the organizer daily and submitted to their leads and the leads forwarded them to Davere Godfrey who would review and file them. (Tr. 207). The purpose of the form was to ensure accountability and to track whether organizers are meeting their goals. (Tr. 539). Sometimes duplicate names would appear on debrief sheets but organizers were not disciplined if this occurred. (Tr. 209). As was common practice, Cabrera turned in debrief sheets for October 18, 2017. The debrief sheets included the names of the persons who he had had contact with who signed the sign in sheet but did not sign the TWR cards. (GC Exh. 18). On October 24, 2017, he submitted a new debrief sheet which also included the same names of the persons who signed the sign in sheet but did not sign the TWR cards. He also included the unsigned TWR cards with the October 24, 2017 debrief sheets. (GC Exh. 19). At 4:54 on October 25, 2017, Cabrera sent Grace Vegara and Davere Godfrey an email advising, "looking at my records now I realize that part of the report I submitted yesterday was a duplicate from October 18, I can explain in person if you need me to." (GC Exh. 21). Respondent was not aware of any issue regarding the duplicate names on the debrief sheets until Cabrera brought it to their attention. (Tr. 206). That evening Respondent launched an investigation.

6. The Investigatory Meeting of October 25

After receiving the TWR cards that Cabrera submitted and without first asking for his explanation about why the cards were filled out and not signed, the Lead Saenz was directed to call members to ask if they in fact had filled out the cards. After gathering information regarding the cards and determining that the members had not filled out the cards, Vegara and Godfrey informed Manteca. Manteca instructed Godfrey to conduct an investigatory meeting. This is true despite the fact that there was no written rule that would preclude an organizer from filling out a TWR card and later having the member sign it. (Tr. 205).

Cabrera attended the meeting with his representative Steve Sorenson. Davere Godfrey conducted the meeting. During the meeting, Cabrera was questioned about Cabrera's failure to show up for the Public Defender and phone banking events, his failure to properly set up the meeting on October 17, 2017, the TWR cards he filled out, his debrief sheets with duplicate names and TWR cards that he collected with the words "on file" on them. Returning cards with "on file" written on them was considered an improper method of completing the TWR cards but others including Cabrera had filled out cards in this fashion and upon discovery were sent back to the members in an attempt to correct the card. (Tr. 217). Other persons besides Cabrera who returned cards with the "on file" designation were not disciplined. (Tr. 216–217).

When questioned about each of the items Cabrera provided his explanations. Regarding the meeting set up, he advised that he emailed the person responsible for the set up the night before. (GC Exh. 16). He explained that he thought Vegara's statement in the email, "see you tomorrow" excused him from work the whole day. When confronted with language in the email indicating that Helen Sanders would be accompanying him to the Public Defender event, he

asserted that he merely misinterpreted the email sent by Vegara due to the late hour of the email and the medications he was taking. When asked about the TWR cards he explained how he created the sign in sheet and advised that he filled out the unsigned cards and further advised that he submitted the duplicates because he hadn't remembered if he submitted them the week prior and further noted that it was he who called attention to the duplicates.

After the meeting, Godfrey sent Cabrera an email asking him to provide:

1) A copy of the Oct 18th Sign in sheet presented during the investigatory meeting;
2) The prescriptions of medications, indicated that were prescribed by your dentist on October 14th. As well as any other medications prescribed thereafter through October 24th, including any other prescribed medication from any other health care provider during this period that you believe affected your cognitive abilities; and
3) The text messages between Cabrera and Helen Sanders on October 17 regarding the Public Defenders meeting that day as well as the text and email correspondences with Ms. Sanders on October 18.

As requested, Cabrera provided the information to Godfrey and was told to return on Monday at 9:30. (GC Exh. 16, 23). After the meeting, Godfrey met with Manteca to discuss what had transpired in the meeting with Cabrera. Godfrey testified regarding his recommendations to Manteca as follows:

> Q. So you're saying now you didn't make a -- recommend any discipline?
> A. No, what I'm saying is, when he asked me, I told him that suspension would the best most – suspension--if he--suspension would be the minimum that we could even go here because of the severity of it and the overall. (Tr. 249). [1]

When Cabrera returned on October 30, 2017, he was presented with a Notice of Termination. After some discussion regarding what Cabrera thought were discrepancies he was presented the Notice of Termination signed by Martin Manteca. (GC Exh. 4). He signed and acknowledged receipt. Respondent alleges that his termination was due to his alleged "poor performance, dishonesty, and falsifying reports." (Tr. 99).

*C. **Analysis***

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally,

[1] Manteca contradicted this testimony (apparently to fit his own narrative) by asserting that Godfrey recommend Cabrera be terminated. (Tr. 106). I credit Godfrey's testimony on this issue.

encouraging or discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233 (1963).

Section 8(a)1 makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed "by the Act, 29 U.S. C. Section 158(a)(1). Unlike 8(a)(3) violations, motive is not a critical element of a Section 8(a)(1) violation. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Nevertheless, the discriminatory termination of an employee that is motivated by his/her union activities by its very nature interferes with and/or restrains employees in the exercise of their rights and is unlawful under both Sections 8(a)(3) and 8(a)(1). See 1938 *NLRB Annual Report* 52 (1939) noting that "a violation by the employer of any of the four subdivisions of Section 8, other than subdivision one is also a violation of subdivision one."

In 8(a)(3) discriminatory discharge cases, the Board looks to the analysis set forth in *Wright Line* to inform of the proper analytical framework. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management. Corp*., 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee union activity was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Circumstantial evidence alone may be sufficient. Antiunion motivation may be reasonably inferred from a variety of factors, such as a company's expressed hostility towards unionization together with knowledge of the employees' union activities, proximity in time between the employees' union activities and their discharges, the inconsistencies between the proffered reason and other actions of the employer, and disparate treatment of certain employees compared to other employees with similar work records or offenses. Furthermore, where an employer's representatives have announced an intent to discharge or otherwise retaliate against an employee for engaging in protected activity, the Board has before it especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated. *Hyatt Regency Memphis*, 296 NLRB 259 (1989), enfd. 944 F.2d 904 (1991). *Turnbull Cone Baking Co. v. NLRB*, 271 NLRB 1320 (1984), enfd. 778 F.2d 292, 297 (6th Cir.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 720 (1986) (citations omitted).

The Board has also long recognized that in discrimination cases "the timing of the [employer's conduct] is strongly indicative of animus." *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *N.C. Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing Inc*., 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation, Inc*., 343 NLRB 43, 48 (2004); *Structural Composite Industries*, 304 NLRB 729, 729 (1991).

In order to establish a prima facie case under 8(a)(3), the General Counsel must establish the following elements: "(1) union activity; (2) employer knowledge of the activity; (3) adverse

action against the employee; 4) a causal connection between the union activity and the adverse action. *Sprain Brock Manor Nursing Home, LLC* 351 NLRB 1190, (2007), *Conley v. NLRB*, 520 F.3d. 629 (6th Cir. 2008). Under the *Wright Line* framework, to support a violation of § 8(a)(3) based on employee discipline, the General Counsel of the Board "must make a prima facie showing that protected conduct was a 'motivating factor' in the employer's decision to discipline the employee." *La–Z–Boy*, 390 F.3d at 1057 (describing the NLRB's burden-shifting analysis of *Wright Line*, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir.1981), cert. denied, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982)).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's union activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). In this regard the employer "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l,* 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

1. The Prima Facie Case

a. Union Activity

It is undisputed that Cabrera engaged in union activities. Most pertinent to the allegations herein, he was the President of the Staff Union and advocated on behalf of staff members. In this regard, he directly filed and signed grievances which named and directly challenged Martin Manteca, the person who was directly involved in the termination decision. In a grievance dated 10/06/2017, Cabrera's grievance directly named Manteca as the responsible management official for allegedly singling out an employee using an "aggressive and angry tone" and as a remedy requested that "management refrain from using fear tactics or any other manipulative actions to exert excessive power over bargaining unit employees." (GC Exh. 12(f). In another grievance dated 7/25/2017, Cabrera again directly referenced Manteca alleging, in part, that Martin proceeded to "ridicule" and "mock" an employee for the manner in which she communicated in front of 3 international representatives. (GC Exh. 12(c). As a requested remedy, Cabrera set forth the following:

> That management treat everyone on staff with dignity and respect, that management will not intimidate staff knowingly and unknowingly, that all forms of harassment cease immediately, that we will have a discussion in our staff meeting about mutual respect, that management be clear on communications between staff members and management (any members of the management team) before badgering and intimidating staff members, that management commit to a team approach with all of the SEIU staff, and that management recognize that SEIU staff members are working within the scope of their directives. (GC Exh. 12(c).

In another grievance in which Manteca was directly named Cabrera noted in part:

> Our working conditions consists (sic) of working very extended hours unnecessarily, performing work in multiple job descriptions resulting in extended hours to complete the minimal requirements for our actual assigned job duties, not being allowed to leave work at reasonable times, and not taking appropriate lunch rest breaks. (GC Exh. 12(a).

In light of the above, I find that the General Counsel established the first element of the prima facie case that Cabrera engaged in union activities.

b. The Employer Was Aware of Cabrera's Activities

There is also no dispute regarding the second element of the prima facie case. As the above discussion makes clear, Cabrera openly advocated on behalf of employees as the Union President and filed grievances directly challenging the action of Manteca and in fact on occasion advocated on behalf of employees in face to face meetings with Manteca. Thus, I find that the General Counsel established the second element of the prima facie case.

c. Cabrera's Was Subjected to an Adverse Action

The third element of the prima facie case is also met as it is undisputed in the record that Cabrera suffered an adverse action in that he was terminated on October 30, 2017.

d. Cabrera's Termination Was Causally Connected to His Union Activities

Manteca's Statements

The General Counsel alleged that proof of unlawful motive lay in statements made by Manteca in which he directly stated his intention to get rid of Cabrera because he was the Staff Union President. Roberts, a supervisor, testified that during a meeting and in his presence, Manteca told him directly, "that he needed to figure out a way to get rid of Javier because he was the Local -- he was the staff president." (Tr. 41). Similarly, Cabrera testified that he overheard Matenca state, "I need to get rid of Javier Cabrera because he is the Staff Union President and he's going to be an obstacle for what I -- what I want to do here.:" (Tr. 358).

Manteca denies that he made the statements about his intention to get rid of Cabrera. After considering the matter fully and having listened directly to the testimony of the witnesses regarding this issue, I credit the testimony of Roberts and Cabrera. In the first instance, it is important to note the Roberts was a supervisor and agent of the employer who appeared to testify in a truthful manner regarding this issue. Moreover, as will be discussed in more detail below, the totality of the evidence, including the disparate treatment of Cabrera, as well as the failure to follow the progressive discipline protocols, despite a recommendation of suspension, corroborate the stated intention to get rid of Cabrera.

The statements of Manteca amount to direct evidence of animus and are sufficient in and of themselves to establish the requisite animus and causal connection between the union animus and the adverse action. Thus, the fourth element of the prima facie case is met.

Assuming for the sake of argument the direct evidence of animus was not credited, there is substantial circumstantial evidence in the form of disparate treatment and the failure to follow progressive discipline that would support the same conclusion. The record is replete with evidence that Cabrera was treated more harshly than other employees regarding each of his alleged infractions.

Despite Respondent's own admissions that TRW cards did not have any deadline and organizers could simply return them to employees to obtain signatures Cabrera was disciplined. Respondent also admitted that Cabrera even told its officials that he intended to have the cards signed by members. (Tr. 214, 564). (Tr. 122–123, 216). It is important to note that Cabrera did not fraudulently sign the cards but instead turned in unsigned cards in which he transferred information from the sign in sheet to preserve information after he forgot to bring the cards to the meeting. (GC Exh. 17). Respondent nevertheless elevated the matter to discipline. This is true despite the fact that Blue testified that such conduct would warrant coaching or an action plan. (Tr. 566). In a much more serious circumstance relating to another employee in which a fraudulent membership card was actually signed, and an employee was suspected of falsifying a membership card, no discipline was meted out to that employee despite undisputed evidence that the employee turned in a card that was not signed by the member.[2] (Tr. 95–96). No other employees were disciplined regarding any matter relating to any TRW card. (Tr. 216).

Other examples of disparate treatment are found in the discipline Cabrera received regarding his absence. Respondent admitted that no call- no shows were common. Manteca testified that it happened regularly and would average once a month. (Tr. 114). Yet no other employees were disciplined. Cabrera was disciplined despite the fact that it was undisputed that he sought and in fact underwent dental treatment (and provided medical documentation to substantiate the treatment)[3], and despite the fact that during the entire time he was not at work, he was in direct communication with a person whom Respondent stipulated was in fact his supervisor. Nevertheless, he was singled out for discipline. Respondent knew he was out sick yet there is no evidence to establish that this supervisor ever mentioned to him (despite his misreading of the email) that his sick leave was in fact not approved and that he should immediately report for duty. Nor was he given any opportunity to correct and submit a new sick

[2] Respondent asserted that the employee was not disciplined because she was found to not have engaged in wrongdoing. This finding was predicated on the notion that she collected a card that was filled out by someone other than the member and provided to her which appears to be contrary to Respondent's own stated policies. Manteca testified that membership cards are to be filled out by and signed by members and members only. (Tr. 125). The employee admitted that she was not always physically present when members were being signed up. (GC Exh. 8). Despite these facts, which on their face appear more significant that those presented by unsigned TWR cards, no discipline including even the lowest level of discipline was meted out.

[3] Godfrey testified that no other employees were even asked to provide medical documentation for their absences or prescription records. (Tr. 247). This is in and of itself stand-alone evidence of disparate treatment.

leave request. The lenient no call no show policy described above by Manteca simply didn't apply to Cabrera.

Regarding the debrief sheets, Godfrey testified that they were used to monitor goals and were simply filed in a binder after they were received. He also testified that others turned in debrief sheets where an identical name appeared on the sheet but the persons were never disciplined. (Tr. 208). Despite the fact that Cabrera himself notified Respondent that duplicate names appeared on the 10/18 and 10/24 debrief sheets and the reasoning behind the duplicate names, he was branded as being dishonest. When confronted with the question directly of whether Cabrera's bringing the matter to Respondent's attention was an act of honesty, Luisa Blue became evasive and would not directly answer the simple question. Her evasiveness regarding this particular question stands out in the record. (Tr. 575).

Other evidence of animus exists in the undisputed evidence of record that despite the existence of Article 7 which provides for progressive discipline, Respondent bypassed all levels of progressive discipline. Respondent asserted that five levels of progressive discipline were skipped because the actions were serious. These assertions aren't borne out by the treatment of other employees who engaged in similar or worse conduct. As noted above, no employee was disciplined for TRW card deficiencies, no other employee was disciplined for writing "on file" on TRW cards, no other employee was disciplined for no call no show actions, no employee was disciplined for duplicate names on debrief sheets, no employee was disciplined for bringing to Respondent's attention duplicate names on debrief sheets which in fact were merely filed in a binder. Nevertheless, despite Respondent's own supervisor's recommendation of suspension, Cabrera's infractions were all elevated to termination. The totality of all of this evidence leads to the conclusion that Respondent's asserted reasons for skipping the progressive discipline process are simply pretextual and not credible.[4] *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (1995) (D.C. Cir. enfd. 312 NLRB 155 (1993). *Lucky Cab*, 360 NLRB 271 (2014).

2. . Respondent Failed to Meet its Burden

Respondent argued that it would have taken the same action even in the absence of animus, I find however that it failed to meet its requisite burden regarding this issue. This conclusion flows directly from the stark direct evidence of animus that appears in the record and the clear evidence of the disparate treatment afforded Cabrera. The Board has consistently held that Respondent's burden cannot be satisfied by proffered reasons that are pretext, or where the evidence establishes that protected activity was the actual motivation. *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007). Applying these principles, I find Respondent failed to satisfy its *Wright Line* defense.

[4] It is important to note that the manner in which the explanation for skipping progressive discipline arose warrants giving little weight to the explanation. Manteca at first testified that progressive discipline was followed then later after being led to the language of the CBA, changed his testimony to suggest that the actions were severe enough to skip progressive discipline. (Tr. 111, 138).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Charging Party for engaging in union activities Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall make Javier Cabrera whole in all respects. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In addition, Respondent shall compensate Javier Cabrera for his search-for-work expenses regardless of whether those expenses exceed her interim earnings. Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010) as more fully set forth in *King Soopers*, 364 NLRB No. 93 (2016), affd. *King Soopers v. NLRB*, 893 F.3d 23 (10th Cir. 2017).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Service Employees International Union Local 1107 its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating any employee for engaging in union activities, including but not limited to advocating on behalf of staff members as a union official of the Nevada Service Employees Union Staff Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Javier Cabrera full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Javier Cabrera whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the decision. Compensate Javier Cabrera for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Social Security Administration allocating the backpay award to the appropriate calendar year(s).

(c) Rescind and expunge any negative and derogatory information relating to his termination and union activities from his employment records.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Javier Cabrera and thereafter notify him in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against him and/or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against her in any way.

(e) Preserve and provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada and its remote locations, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 18, 2019

Dickie Montemayor
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fire you because of your membership or support for the Nevada Service Employees Union Staff Union.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer JAVIER CABRERA immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL pay JAVIER CABRERA for the wages and other benefits he lost because we fired him.

WE WILL remove from our files all references to the discharge of JAVIER CABRERA and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866- 667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY 2 service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400 Phoenix, AZ 85004-3019 Telephone: (602) 640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-209109 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer (602) 416-4755.